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IN THE
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, ET AL.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations, represent-

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. This brief is filed with the consent of all the parties. Counsel for *amicus* gave notice to all parties at least 10 days prior to filing, as required by rule.

ing 300,000 direct members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In that capacity, the Chamber has participated in hundreds of cases before this Court, including many involving energy issues. *See, e.g.*, *Graham County Soil & Water Conservation Dist.* v. *United States*, No. 08-304 (cert. granted June 22, 2009); *Entergy Corp.* v. *Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

This is a paradigmatic case of national concern. It goes almost without saying that "[t]he economic significance of electricity is staggering," and that "[e]conomic prosperity, national security, and public health and safety cannot be achieved without it." U.S. Department of Energy, *Overview of the Electric Grid* ("*DOE Electric Grid Overview*").[2] The ever-growing importance of electricity is reflected in the recent national focus on next-generation technologies to generate more and more power, and indeed the Chamber has worked to advance those technologies by advocating for the regulatory approval of "green" energy projects.[3] But generation capacity alone is not enough. If power cannot be shipped from its point of origin to the location where it is needed—in other words, if transmission bottlenecks block the free flow of electricity like a dam on a river—then

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[2] *Available at* http://sites.energetics.com/gridworks/grid.html (last checked Oct. 16, 2009).

[3] *See* U.S. Chamber of Commerce, *Project No Project* Website (describing the Chamber's advocacy on these issues), *available at* http://pnp.uschamber.com (last checked Oct. 18, 2009).

the power might as well not have been generated in the first place. All the nuclear, solar, wind, and other cutting-edge power-generation techniques in the world will be of little use if the national transmission grid is not up to par.

Recognizing as much, Congress took steps in the Energy Policy Act of 2005 (the "Act") to alleviate one of the primary causes of transmission bottlenecks: inefficiencies in the regulatory approval process for new transmission lines. Section 1221 of the Act—codified in relevant part as Section 216 of the Federal Power Act, 16 U.S.C. § 824p ("Section 216")—empowered the Department of Energy to designate regions of the country with the most serious bottlenecks. 16 U.S.C. § 824p(a). In those designated regions, the Federal Energy Regulatory Commission ("FERC") may approve the siting of new transmission facilities if the state cannot or will not do so. *Id.* § 824p(b). This "backstop" siting authority is crucial to ensuring that the nation's transmission grid keeps pace with its generation capacity. *See* U.S. Chamber of Commerce, Institute for 21st Century Energy, *Blueprint for Securing America's Energy Future* 48-49 (Sept. 2008)[4] (observing that "[b]lackouts, brownouts, service interruptions, and rationing could become commonplace without new and upgraded [transmission] capacity" and calling for Congress to "simplify siting for electric transmission facilities" by giving FERC expanded siting authority).

A two-judge panel majority has now substantially hamstrung the backstop siting authority granted

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[4] *Available at* http://energyxxi.org/reports/Blue_Print.pdf (last checked Oct. 20, 2009).

FERC by the Act—and it has done so on review of consolidated petitions from multiple circuits, meaning its interpretation would be the last word absent this Court's review. The panel majority ruled that the phrase "withheld approval for more than 1 year"—one of the state regulatory acts that triggers FERC backstop authority under Section 216—encompasses only *delays* in permitting, not timely refusals to issue a permit. Pet. App. 33a. But if a state regulator can block any new transmission facility by merely issuing a timely denial, no matter how important the facility would be to the broader electrical grid, and no matter the regulator's reason, then FERC's backstop authority will do little to advance its intended purpose: "to facilitate the process of siting critical regional transmission lines and facilities [and] ensuring adequate capacity and increased reliability on the electric transmission grid." Pet. App. 257a.

This is, in short, a singularly important case. Because electricity is the lifeblood of modern business, and because the decision below "significantly curtails FERC's ability to address critical infrastructure deficiencies," Pet. of Resp't Fed. Energy Regulatory Comm'n for Reh'g En Banc at 3, *Piedmont Envtl. Council* v. *FERC*, No. 07-1651 (4th Cir. Apr. 2, 2009), the Chamber has a substantial interest in seeing this Court grant the writ and reverse the decision of the Fourth Circuit.

ARGUMENT

I. AN EFFICIENT ELECTRICAL TRANSMISSION GRID IS CRUCIAL TO THE CONTINUED VITALITY OF THE U.S. ECONOMY.

1. Electrical power is, of course, essential to modern business, and growing more so every day. Electricity demand in the United States has increased by about 25 percent since 1990, *see DOE Electric Grid Overview*, and is projected to grow 26 percent more by 2030. *See* Energy Information Administration, *Annual Energy Outlook 2009*, DOE/EIA-0383 at 71 (Mar. 2009) ("*Annual Energy Outlook*").[5] Much of that demand stems from "an economy relentlessly grown digital." U.S. Department of Energy, *The Smart Grid: An Introduction* at 8 (2008) ("*The Smart Grid*").[6] In the 1980s, computerized systems and appliances and automated manufacturing consumed only a tiny fraction of the nation's electricity; that share has risen to 40 percent today, and "is expected to increase to more than 60 percent by 2015." *Id.*; *see also Annual Energy Outlook* at 65 (finding that growing demand is fueled by "commercial establishments, which increasingly depend on * * * electronic office equipment" as well as by "demand for * * * electricity to power medical and monitoring equipment" at health-care facilities).

Put another way, modern technology will soon account for well over half of American electricity use—

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[5] *Available at* http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2009).pdf (last checked Oct. 16, 2009).

[6] *Available at* http://www.oe.energy.gov/SmartGridIntroduction.htm (last checked Oct. 16, 2009).

and the lion's share of that technology is deployed by business. "The 'information economy' requires a reliable, secure, and affordable electric system to grow and prosper." *DOE Electric Grid Overview*. Without such a reliable power supply, America's businesses cannot compete on a global stage.

2. That power supply has not always proven up to the task. "Today's electricity system * * * allows for power outages and interruptions that cost Americans at least *$150 billion each year*—about $500 for every man, woman and child." *The Smart Grid* at 5 (emphasis added). "These costs could soar if outages or disturbances become more frequent or longer in duration." *DOE Electric Grid Overview*. A few examples illustrate the magnitude of loss even short outages can cause: According to the Department of Energy, the Northeast blackout of 2003 cost the region $6 billion; a one-hour outage that hit the Chicago Board of Trade in 2000 delayed $20 trillion in trades; and blackouts cost a single company—Sun Microsystems—$1 million per minute. *The Smart Grid* at 8. Much of the blame for these outages falls to the nation's transmission system, or "grid."

The grid—actually a set of three large regional grids—features more than 200,000 miles of interconnected transmission lines that serve more than 283 million people. *See* U.S.-Canada Power System Outage Task Force, *Final Report on the August 14, 2003 Blackout in the United States & Canada* at 5 (2004).[7] It relies on super-high-voltage transmission over long distances to increase efficiency: Electricity

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[7] *Available at* https://reports.energy.gov/BlackoutFinal-Web.pdf (last checked Oct. 15, 2009).

from generators is "stepped up" to higher voltages for transportation; it flows through the interconnected network of transmission lines to the location where it is needed "along 'paths of least resistance,' in much the same way that water flows through a network of canals." *Id.* at 6. When the power arrives at its destination, it is "stepped down" to lower voltages for distribution to customers. *Id.*

This complex transmission system "is one of the great engineering achievements of the past 100 years," *id.* at 5, but of late it has been allowed to languish. "While electricity demand increased by about 25% since 1990, construction of transmission facilities decreased about 30%," and overall "annual investment in new transmission facilities has declined over the last 25 years." *DOE Electric Grid Overview.* The result is grid "congestion"—the term for the inability of the transmission system to move electricity, efficiently and reliably, from where it is generated to where it is needed.

Grid congestion is a major contributor to the billions of dollars in losses that the system causes each year. "Congested transmission paths, or 'bottlenecks,' now affect many parts of the grid across the country." *Id.* And that means higher electricity costs and higher risk of blackouts. "When a constraint prevents the delivery of a desired level of electricity across a line in real time, system operators must 'redispatch' generation, * * * cut wholesale transactions previously planned to meet customers' energy demand at lower cost, or as a last resort, reduce electricity deliveries to customers." U.S. Department of Energy, *National Electric Transmis-*

sion Congestion Study 3 (Aug. 2006).[8] Put another way, the grid is designed to find the most efficient source of power for a given user and instantly route it from the generation point to that user. When a bottleneck makes that impossible, the user will either pay more to acquire energy in a less efficient way, or will not receive the electricity it needs at all.

The amount of trouble congestion can cause is "related to how heavily the system is loaded," *DOE Electric Grid Overview*, and that load is growing. For example, annual transactions on the Tennessee Valley Authority's transmission system exceed 250,000 today—more than twelve times the level of just over a decade ago. *Id.* And when the grid is asked to handle new loads without additional capacity, breakdowns follow. "Congestion on transmission lines, as more and more power is moved over them, can have a significant impact on reliability." North American Electric Reliability Corp., *2008 Long-Term Reliability Assessment* 17 (2008).[9] That is so not just because a given line is overburdened, but because it is also asked to take on yet more load to make up for overloaded lines elsewhere: "As these lines reach their capacity * * * they are less able to make up the difference when neighboring lines are forced out of service." *Id.* Congestion thus "acts somewhat like cholesterol in the body, causing flows to be constrained, increasing stress on the system, and contributing to the likelihood of a breakdown." ICF

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[8] *Available at* http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf (last checked Oct. 16, 2009).

[9] *Available at* http://www.nerc.com/files/LTRA2008.pdf (last checked Oct. 16, 2009).

Consulting, *The Costs and Benefits of Investing in the US Transmission Grid* 1 (2004).[10]

3. For all of these reasons, "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function." S. Rep. No. 109-78 at 8 (2005); *see also* H.R. Rep. No 109-215 at 171 (2005) ("Investment in electric transmission expansions has not kept pace with electricity demand."). Failure to expand the grid, and remove bottlenecks, "could interfere with regional economic development." *DOE Electric Grid Overview*. Yet investment in the transmission infrastructure still is not occurring quickly enough. And Congress has identified, as one of the main factors contributing to the problem, the very issue at the center of this case: the state regulatory approval process for transmission-line siting.

The House Report accompanying the legislation that became the Energy Policy Act of 2005 found that the "state regulatory approval [process] delays siting of new transmission lines by many years." H.R. Rep. No. 109-215 at 171. The Senate likewise found that "[r]egulatory uncertainty" and "a lack of coordination among States" in siting transmission lines "impede the improvement of the electric system." S. Rep. No. 109-78 at 8. *See also DOE Electric Grid Overview* (identifying "jurisdiction and government agency overlap for siting and permitting" as one of the "significant impediments [that] interfere with solving the country's electric transmission problems"); Brian T. Burgess, Note, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization*

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[10] *Available at* http://www.icfi.com/markets/energy/doc_files/us-transmission-grid.pdf (last checked Oct. 16, 2009).

Argument & California Assembly Bill 1493, 84 N.Y.U. L. Rev. 258, 274 (2009) (discussing literature that favors preemption where a state blocks a regionally beneficial project and observing that "the values of federalism cannot include leaving states free to extract costs from nonresidents to the disadvantage of other states and the nation as a whole").

To solve the problem, Congress enacted Section 216. *See* 150 Cong. Rec. S3732 (daily ed. Apr. 5, 2004) (statement of Sen. Domenici) (stating that Section 216 is designed to "streamline the permitting of siting for transmission lines to assure adequate transmission"). That provision authorizes the Department of Energy to designate "National Interest Electric Transmission Corridors"—in other words, regions where grid congestion is particularly bad—and empowers FERC to issue construction permits for transmission facilities in those corridors in situations where a state is unwilling or unable to do so. See 16 U.S.C. § 824p(a)-(b). Congress, in short, gave FERC the power, in limited circumstances,[11] to override state regulators when those regulators erect roadblocks to a regionally or nationally important transmission facility.

FERC correctly recognized that this federal authorization is critical to its ability to break up

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[11] Under the Act, FERC can only issue a permit if (i) the desired transmission facility is located in a National Interest Electric Transmission Corridor and (ii) FERC finds that numerous other statutory requirements are met, including that the facility "will significantly reduce transmission congestion in interstate commerce" and "will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures." 16 U.S.C. § 824p(b)(2)-(6).

transmission bottlenecks—and that its effectiveness will be severely curtailed if a state in a congestion-ridden region can simply say "no" to a reasonable transmission line proposal, without further recourse or consequences. This Court should grant the petition for certiorari to consider whether the Fourth Circuit's interpretation of Section 216 fails to respect Congress' language and intent in adopting that provision. The expansion of this nation's electric transmission capacity is too important to let this case pass.

II. THE DECISION BELOW REPRESENTS A SKEWED APPROACH TO *CHEVRON* DEFERENCE.

Three judges of the Court of Appeals, and before them five FERC Commissioners, have thus far brought to bear their authority to interpret the phrase at the center of this case: "withheld approval for more than 1 year." Of those eight people, five have concluded that the phrase should be read to include outright denials—and indeed Judge Traxler, for his part, concluded that it *must* be so read. *See* Pet. App. 70a (four-Commissioner majority); Pet. App. 34a-35a (Traxler, J., dissenting). That the panel majority not only rejected that conclusion, but in fact held that it is not even a *plausible* reading of the statute, reinforces the need for further review here. The meaning of Section 216 should not be settled by dint of two judges' aggressive resort to *Chevron* step one.

1. Under the familiar *Chevron* formulation, a court reviews an agency's implementation of a federal statute by "ask[ing] first whether 'the intent of Congress is clear' as to 'the precise question at

issue.' " *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). If the answer is yes, " 'that is the end of the matter,' " but " 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *Id.* (quoting *Chevron*, 467 U.S. at 842-843).

Chevron, of course, authorizes gap-filling by the agency—here, FERC—"charged with the Statute's administration." *National Fed'n of Fed. Employees, Local 309* v. *Department of Interior*, 526 U.S. 86, 91 (1999). But *Chevron*'s assignment of such interstitial power to agencies creates for the judiciary "incentives against recognizing ambiguity": A judge who disagrees with an agency's statutory interpretation, but thinks it would survive the deference due at *Chevron* step two, may feel "pressure to * * * thrust uncomfortable certainties upon ambiguous text." Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977, 1005 (2008); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 977 (1992). The majority ruling below is a useful exhibit to that theorem. The panel majority should have concluded, as FERC did, that the phrase "withheld approval for more than 1 year" naturally includes denials. But even if the majority disagreed with FERC on that point, it should have recognized that the phrase is at least ambiguous. At that point it should have deferred to FERC's interpretation. After all, "[u]nder Chevron Step I, a court is entitled to supplant an agency's interpretation

only where Congress clearly intended another interpretation[.]" *Central States Motor Freight Bur., Inc.* v. *I.C.C.*, 924 F.2d 1099, 1104 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (quotation marks omitted). And it cannot fairly be said that Congress "clearly intended" only the meaning assigned by the majority below.

2. That is so first and foremost because it is quite acceptable, in common parlance, to say that approval has been "withheld" in any circumstance where it has not been granted, regardless of the mechanism by which the withholding occurs. *See* Pet. 15. Petitioners offered a compelling example in their briefing below: As they correctly observed, countless contracts (and statutes) provide that approval or consent may not be "unreasonably withheld," and that provision "routinely is interpreted to include not only the failure to consent but also the outright denial of consent." Br. of Petitioners 17, *Piedmont Env'tl Council* v. *Edison Elec. Inst.*, No. 07-1651 (4th Cir. Jan. 8, 2008) (citing cases).

But in this case, there is more to go on even than compelling arguments by analogy; in this case, a majority of the judges and regulators who have authoritatively interpreted the phrase have concluded that it is best read to bear a different meaning than the one the panel majority concluded was inescapable. This Court has explained that such disagreements cut convincingly in favor of the conclusion that statutory text is at least ambiguous. In *Smiley* v. *Citibank*, 517 U.S. 735, 739 (1996), for instance, the Court concluded in light of a dissent from the opinion on review, and the existence of another judicial opinion taking the opposite view of the statute, that "it would be difficult indeed to

contend that the word 'interest' * * * is unambiguous." And in *National Federation*, 526 U.S. at 98, the Court reversed the Fourth Circuit's rejection of an agency interpretation at *Chevron* step one, and in so doing observed that the D.C. Circuit has reached a "similarly absolute, but opposite, reading." That approach makes sense. After all, it would be the rare case where multiple experienced regulators and judges all assign to a phrase a meaning that it cannot reasonably bear.

FERC's resolution of the interpretive question, in short, was either clearly correct or at the least entitled to deference. The Fourth Circuit's contrary conclusion was error—and because that court was adjudicating multiple consolidated petitions for review, no other circuit will have the opportunity to weigh in on the matter. This Court should grant the writ to review the Fourth Circuit's application of *Chevron* in this case with ramifications for businesses across the country.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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